

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALYSSA A. ARNOLD,)	
)	CASE NO. C10-1643-RAJ
Plaintiff,)	
)	
v.)	
)	REPORT AND RECOMMENDATION
MICHAEL J. ASTRUE, Commissioner of)	
Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Alyssa A. Arnold appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be AFFIRMED.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1975 and was 26 years old on her alleged onset date of disability. (Administrative Record (“AR”) at 27.) She obtained a General Equivalency Diploma

01 (“GED”) and completed one year of community college. (AR at 27, 139, 200.) Her past
02 work experience includes employment as a grocery bagger, cashier, riveter, nurse’s assistant,
03 and hand packager. (AR at 29-30, 48, 145.) Plaintiff was last gainfully employed in 2001.
04 (AR 29.)

05 Plaintiff asserts that she is disabled due to epilepsy/seizures, depression, cognitive
06 disorder, borderline personality disorder, cocaine dependence, amphetamine abuse, and alcohol
07 abuse. (AR at 11.) She asserts an onset date of February 1, 2002. *Id.*

08 The Commissioner denied plaintiff’s claim initially and on reconsideration. (AR at
09 57-60.) Plaintiff requested a hearing, which took place on July 24, 2009. (AR at 20-55.)
10 The ALJ heard testimony from plaintiff and vocational expert Brian Sorenson. *Id.* On
11 September 9, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR at 9-19.)

12 Plaintiff’s administrative appeal of the ALJ’s decision was denied by the Appeals
13 Council (AR at 1-30), making the ALJ’s ruling the “final decision” of the Commissioner as that
14 term is defined by 42 U.S.C. § 405(g). On October 11, 2010, plaintiff timely filed the present
15 action challenging the Commissioner’s decision. (Dkt. No. 3.)

16 II. JURISDICTION

17 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§
18 405(g) and 1383(c)(3).

19 III. STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
21 social security benefits when the ALJ’s findings are based on legal error or not supported by
22 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th

01 Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
 02 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
 03 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for
 04 determining credibility, resolving conflicts in medical testimony, and resolving any other
 05 ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While
 06 the Court is required to examine the record as a whole, it may neither reweigh the evidence nor
 07 substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954
 08 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is
 09 the Commissioner’s conclusion that must be upheld. *Id.*

10 The Court may direct an award of benefits where “the record has been fully developed
 11 and further administrative proceedings would serve no useful purpose.” *McCartey v.*
 12 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
 13 (9th Cir. 1996)). The Court may find that this occurs when:

14 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
 15 claimant’s evidence; (2) there are no outstanding issues that must be resolved
 16 before a determination of disability can be made; and (3) it is clear from the record
 that the ALJ would be required to find the claimant disabled if he considered the
 claimant’s evidence.

17 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
 18 erroneously rejected evidence may be credited when all three elements are met).

19 IV. DISCUSSION

20 As the claimant, Ms. Arnold bears the burden of proving that she is disabled within the
 21 meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
 22 Cir. 1999) (internal citations omitted). The Act defines disability as the “inability to engage in

any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, it must be determined whether a claimant has engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). The ALJ found plaintiff has not engaged in substantial gainful activity since February 1, 2002, the alleged onset date. (AR at 11.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff has the following severe impairments: epilepsy/seizures (some suspected pseudoseizures); depression, not otherwise specified; cognitive disorder, not otherwise specified; borderline personality disorder; cocaine dependence; amphetamine abuse; and alcohol abuse. *Id.* Step three asks whether a claimant’s impairment or combination of impairments meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpt P, App. 1. The ALJ found plaintiff does not have an impairment or combination of impairments that meets or medically equals a listed impairment. (AR at 13.) If the claimant’s impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (“RFC”) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work.

01 The ALJ found plaintiff has the RFC to perform a full range of unskilled work at all exertional
02 levels but with nonexertional limitations. (AR at 14.) If the claimant is able to perform her
03 past relevant work, she is not disabled; if the opposite is true, then the burden shifts to the
04 Commissioner at step five to show that the claimant can perform other work that exists in
05 significant numbers in the national economy, taking into consideration the claimant's RFC,
06 age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180
07 F.3d at 1099-1100. The ALJ found plaintiff is capable of performing her past relevant work as
08 a grocery bagger and hand packager. (AR at 18.) Alternatively, the ALJ found plaintiff is
09 capable of making a successful adjustment to other work that exists in significant numbers in
10 the national economy. (AR at 19.) The ALJ concluded plaintiff has not been under a
11 disability from February 1, 2002, through the date of the decision. *Id.*

12 Plaintiff argues that the ALJ: (1) failed to include all of her limitations in the RFC
13 assessment, (2) erred in the analysis of her credibility, (3) failed to provide germane reasons for
14 rejecting lay witness testimony, (4) erred in evaluating whether she met or equaled a listing, (5)
15 erred in finding her capable of returning to her past work at step four; and (6) failed to meet her
16 burden at step five. (Dkt. No. 14.) She requests remand for an award of benefits, or,
17 alternatively, for further administrative proceedings. *Id.* at 21. The Commissioner argues
18 that the ALJ's decision is supported by substantial evidence and should be affirmed. (Dkt. No.
19 15.) For the reasons described below, the Court agrees with the Commissioner.

20 A. Residual Functional Capacity Assessment

21 The principal issue on appeal is whether the ALJ erred in determining that plaintiff was
22 capable of performing a full range of work at all exertional levels, and the RFC at step four

01 consistent with this determination. This requires consideration of whether the ALJ properly
02 considered and evaluated the medical opinion evidence as well as plaintiff's testimony and the
03 testimony of lay witnesses.

04 An RFC is the "maximum degree to which [a plaintiff] retains the capacity for sustained
05 performance of the physical-mental requirements of jobs." 20 C.F.R. 404, Subpt. P, App. 2
06 §200(c). It is an administrative decision as to the most a plaintiff can do, despite her
07 limitations. SSR 96-8p. The ALJ must assess all of the relevant evidence, including evidence
08 regarding symptoms that are not severe, to determine if the claimant retains the ability to work
09 on a "regular and continuing basis," *e.g.*, eight hours a day, five days a week. *Reddick v.*
10 *Chater*, 157 F.3d 715, 724 (9th Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995);
11 SSR 96-8p.

12 Here, the ALJ determined that plaintiff had the RFC to perform the full range of
13 unskilled work at all exertional levels with no exposure to hazards, including heights and
14 dangerous machinery, and avoidance of concentrated exposure to humidity, extreme cold,
15 fumes, and gases. (AR at 13-14.) Plaintiff argues that this finding did not capture all of her
16 mental functional limitations. (Dkt. No. 14 at 4-11.) Specifically, she contends that the ALJ
17 improperly rejected the opinions of examining psychologist James D. Czysz, Psy.D.

18 1. Evaluation of Medical Evidence

19 As a matter of law, more weight is given to a treating physician's opinion than to that of
20 a non-treating physician because a treating physician "is employed to cure and has a greater
21 opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751;
22 20 C.F.R. § 404.1527(d)(1)-(2). "Likewise, greater weight is accorded to the opinion of an

01 examining physician than a non examining physician.” *Andrews*, 53 F.3d at 1041. However,
02 under certain circumstances, a treating or examining physician’s opinion can be rejected,
03 whether or not that opinion is contradicted by other medical evidence of record. *Magallanes*,
04 881 F.2d at 751. The ALJ must give clear and convincing reasons for rejecting a treating or
05 examining physician’s opinion if that opinion is not contradicted by other evidence, and
06 specific and legitimate reasons if it is. *Reddick*, 157 F.3d at 725. “This can be done by setting
07 out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his
08 interpretation thereof, and making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The
09 ALJ must do more than merely state his conclusions. “He must set forth his own
10 interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing *Embrey*
11 *v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Such conclusions must at all times be
12 supported by substantial evidence. *Id.*

13 Opinions from non-examining medical sources are to be given less weight than treating
14 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
15 opinions from such sources and may not simply ignore them. In other words, an ALJ must
16 evaluate the opinion of a non-examining source and explain the weight given to it. Social
17 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
18 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a
19 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is
20 consistent with other independent evidence in the record. *Thomas*, 278 F.3d at 957; *Orn v.*
21 *Astrue*, 495 F.3d 625, 632-33 (9th Cir. 2007).

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01 a. James D. Czysz, Psy.D.

02 Examining psychologist James D. Czysz, Psy.D., completed a psychological evaluation
03 of the plaintiff for the Department of Social and Health Services (“DSHS”) on December 26,
04 2006. (AR at 266-71.) Dr. Czysz found that plaintiff had severe limitations in her ability to
05 understand, remember, and follow complex instructions; marked limitations in her ability to
06 learn new tasks, exercise judgment, make decisions, perform routine tasks, relate appropriately
07 to co-workers and supervisors, interact appropriately in public contacts, respond appropriately
08 to and tolerate the pressures and expectations of a normal work setting; and moderate
09 limitations in her ability to understand, remember, and follow simple instructions, control
10 physical or motor movements, and maintain appropriate behavior. (AR at 268.) He
11 concluded that her “memory impairment appears valid” and opined that her “difficulty appears
12 to be a combination of cognitive impairment and personality features.” (AR at 268.) He
13 believed “[h]er depression may resolve with treatment . . . but her memory difficulty appears
14 chronic.” (AR at 269.) As such, he recommended “more extensive testing and social security
15 facilitation.” *Id.*

16 The ALJ gave Dr. Czysz’s opinions “little weight,” finding them inconsistent with
17 “other objective medical evidence and the [plaintiff’s] ability to engage in a wide range of
18 activities.” (AR at 16.) The ALJ noted that plaintiff was voluntarily hospitalized from
19 January 28, 2006, through February 3, 2006, after presenting to Harborview Medical Center
20 with depression and suicidal ideation. (AR at 218-234.) Plaintiff reported using crack
21 cocaine constantly for the previous several weeks. (AR at 219.) The discharge summary,
22 prepared by psychiatrist Jacquelyn Ball, M.D., identified plaintiff’s diagnoses as

01 cocaine-induced mood disorder, depressed type; cocaine dependence, episodic; alcohol abuse,
02 episodic; amphetamine abuse, episodic; borderline personality disorder; and seizure disorder.
03 (AR at 218.) Throughout plaintiff's hospitalization, it was noted that although plaintiff
04 "perseverated on her memory problems for which she believed that she needed psychiatric
05 disability," she "exhibited no actual memory or cognitive deficits while on the unit and scored a
06 5.6/6.0 on the Allen Cognitive Level assessment, which is just short of the normal range."
07 (AR at 222.) Dr. Ball also noted that plaintiff was "quite persistent" in requesting that her
08 doctors help her and her husband with disability benefits, and "became angry that she had not
09 been given any disability benefits and at the 'way we're being treated,' and left without
10 participating in her discharge plan. *Id.* Dr. Ball assigned plaintiff a GAF score of 55 (AR at
11 219), indicating moderate symptoms or moderate difficulty in social, occupational, or school
12 functioning (e.g., few friends, conflicts with peers or co-workers). American Psychiatric
13 Ass'n, Diagnostic and Statistical Manual of Mental Health Disorders (Text. Rev., 4th ed. 2000).
14 She recommended that plaintiff "re-engage in [the] workforce." (AR at 223.)

15 The ALJ noted that plaintiff was hospitalized again from April 7, 2006, through April
16 14, 2006, after reporting suicidal ideation when she presented with an infected finger laceration.
17 (AR at 235-56.) The discharge summary, prepared by psychiatrist Ryan Bell, M.D., noted that
18 since her discharge in February, plaintiff and her husband had been homeless and were sleeping
19 under a bridge, and that plaintiff "compensated rapidly after being admitted to the unit." (AR
20 at 236-37.) It was again noted that plaintiff complained about her memory loss, "but it did not
21 interfere with her functioning in any way." (AR at 237.) Plaintiff remembered staff, was
22 oriented to date, place, person, and time, and was able to give directions to the bridge where her

01 personal effects had been left before she came to the emergency room. She also remembered
02 her medication, gave detailed accounts of her past history, and could recall specific facts such
03 as her discharge date. *Id.* Dr. Bell reported “that her memory loss manifested itself in her
04 reported inability to remember her room number without having a sign placed, and unusual
05 lacunae in her memory such as being unable to recall why her husband had been incarcerated,
06 or indeed why she had been incarcerated.” *Id.* Dr. Bell did not assess any significant
07 limitations upon discharge. (AR at 238.)

08 The Commissioner argues that the ALJ properly relied on Dr. Ball’s and Dr. Bell’s
09 findings regarding plaintiff’s memory loss in discrediting Dr. Czysz’s opinions. (Dkt. No. 15
10 at 12.) The Court agrees that the ALJ properly considered the Harborview medical providers’
11 findings. While the reports of Dr. Ball and Dr. Bell are not treating opinions, they nonetheless
12 constituted objective medical evidence that undermined Dr. Czysz’s opinions. *Id.* An ALJ
13 may properly reject an opinion that is conclusory and inconsistent with the record. *See*
14 *generally Meanel v. Apfel*, 172 F.3d 1111, 1113-14 (9th Cir. 1999); *Young v. Heckler*, 803 F.2d
15 963, 968 (9th Cir. 1986).

16 Plaintiff concedes that the Harborview doctors questioned the legitimacy of plaintiff’s
17 memory problems based on their observations during two psychiatric admissions, but argues
18 that Dr. Czysz reached a different conclusion based on his own psychological examination,
19 which included the administration of psychological tests. (Dkt. No. 14 at 6.) Plaintiff
20 contends that Dr. Czysz’s opinions were consistent with the opinions of other examining and
21 non-examining medical sources which were adopted by the ALJ, including the opinions of
22 examining psychologist Phyllis Sanchez, Ph.D., consultative examiner David Mashburn, Ph.D.,

01 and state agency medical consultants Richard Borton, Ph.D., and Renee Eisenhower, Ph.D.
02 (Dkt. 14 at 6-10.)

03 Dr. Sanchez conducted a neuropsychological evaluation of the plaintiff on February 2,
04 2007. (AR at 272-78.) She found that plaintiff has a long history of eating disorder,
05 psychiatric disturbance, substance abuse, and epilepsy with real and pseudoseizures. (AR at
06 278.) Dr. Sanchez notes:

07 She [gave] a detailed accounting of her history, at least some of which can be
08 readily verified (work, treatment and marital status) by review of outside sources,
09 yet she maintains that since her overdose in 1994 she has had significant and
10 debilitating memory problems. Several clinicians who have evaluated her in the
11 past . . . have been highly skeptical that her reported memory problems are
12 debilitating in any way. Ms. Arnold's poor performance on any formal memory
13 test is very suspicious given her ability to function day to day and recall a myriad of
14 details in her life, including her recent life events.

15 Ms. Arnold has a tendency towards perfectionism and distorted self-image, and
16 these tendencies may contribute significantly to what she perceives as her memory
17 disability.

18 (AR at 278.) Although Dr. Sanchez did not find any limitations, she stated that plaintiff's
19 "prognosis is poor . . . regardless of the reality of her cognitive and physical status, as her
20 beliefs, subjective complaints and long-term personality style will drive her behavior in the
21 future." *Id.* The ALJ gave Dr. Sanchez's findings significant weight, but gave her opinion
22 that plaintiff had a poor prognosis little weight because she found it inconsistent with the
23 plaintiff's ability to engage in wide range of activities. (AR at 16.) The Court agrees with the
24 Commissioner that Dr. Sanchez found no limitations and the ALJ was not required to find Dr.
25 Sanchez's opinion supported Dr. Czysz's opinion as plaintiff argues.

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01 Likewise, the ALJ properly weighed the opinion of psychological consultative
02 examiner David Mashburn, Ph.D. (AR at 327-31.) On June 7, 2007, Dr. Mashburn
03 conducted a psychological evaluation of the plaintiff. He found that plaintiff's working
04 memory was very close to the average range, and her trail making A and B demonstrate
05 excellent abilities in visual scanning and cognitive flexibilities. (AR at 330.) Although Dr.
06 Mashburn noted that plaintiff's auditory immediate memory, immediate memory, auditory
07 delay, and general memory appeared to be severely impaired, he added that "[i]t is difficult to
08 say whether or not this is an accurate picture of her current memory functioning." *Id.* Dr.
09 Mashburn opined that plaintiff could complete simple and some detailed tasks in a very timely
10 manner, though she may have difficulty with more complex or detailed tasks that change daily
11 or hourly. He believed that redundant tasks are within her ability. *Id.* He also noted that
12 plaintiff may have difficulties with personal relationships because of her chaotic background
13 and borderline personality traits, and that she would likely get along well with others at times
14 and at other times present as helpless and passive. *Id.* The ALJ gave Dr. Mashburn's opinion
15 significant weight, finding it consistent with the objective medical evidence and claimant's
16 wide range of activities. The Court agrees with the Commissioner that Dr. Mashburn's
17 conclusions did not require the ALJ to find Dr. Mashburn's opinion supported more significant
18 limitations found by Dr. Czysz's.

19 Finally, the ALJ properly weighed the opinions of state agency medical consultant
20 Richard Borton, Ph.D., who reviewed plaintiff's medical records and completed a Mental
21 Residual Functional Capacity Assessment on June 22, 2007. (AR at 385-402.) Dr. Borton
22 found that plaintiff "retains the ability to learn, remember, and complete simple and detailed

01 tasks, so long as they are predictable and repetitive,” and “[s]he should be able to manage
02 casual social contact and tolerate stress acceptability for competitive employment.” (AR at
03 401.) He noted that plaintiff’s “[w]ork attendance would be compromised occasionally by
04 increased depressive symptoms, but should be within tolerable limits otherwise.” *Id.* He
05 further noted that plaintiff “has difficult interpersonal relationships, but in casual contacts
06 would exhibit adequate skills to work in general public settings. Her problems would be more
07 apt to arise with coworkers and supervisors, with whom she has to interact regularly. She
08 should have adequate interpersonal skills, however, to manage occasional supervision and
09 occasional contact with coworkers.” (AR at 402.) Additionally, Dr. Borton found that
10 plaintiff’s “stress tolerance and safety awareness would decline with increased depressive
11 symptoms and/or increased drug use, but are currently adequate to support competitive
12 employment.” *Id.* Dr. Borton’s findings were affirmed by Renee Eisenhauer, Ph.D., on
13 February 14, 2008. (AR at 562.) The ALJ gave these opinions “significant weight,” except
14 noting that plaintiff had only mild social limitations. (AR at 17.) The ALJ incorporated Dr.
15 Borton’s conclusions into plaintiff’s residual functional capacity assessment.

16 Contrary to plaintiff’s contention, Dr. Borton found no marked limitations under either
17 the A or B categories, and specifically concluded that plaintiff “can learn, remember, and
18 complete simple and detailed, repetitive tasks.” (AR at 401.) These conclusions do not
19 require the ALJ to find Dr. Borton’s opinions support more significant limitations found by Dr.
20 Czysz’s as plaintiff claims. (Dkt. No. 14 at 10.)

21 The ALJ’s other reason for rejecting Dr. Czysz’s opinions was that she found them to be
22 inconsistent with plaintiff’s wide range of daily activities. (AR at 16.) Those activities were:

01 “waking up and getting ready at the homeless shelter she was staying at, meeting her husband,
02 going to the library where she played word games and puzzles, going to scheduled
03 appointments and food banks, walking around, going to second hand shops, and window
04 shopping.” (AR at 14.) The ALJ also noted that plaintiff “obtained her own apartment with
05 her husband,” and reported that she kept busy “cleaning and decorating her apartment.” *Id.*
06 “She also reported doing bead work with a friend.” (AR at 14.) It was also reported that “she
07 and her husband walked around their neighborhood and had met quite a few people with whom
08 they had spent time.” (AR at 14-15.) In addition, plaintiff testified that she did the laundry,
09 not her husband, because he would forget to sort the laundry properly. (AR at 15.) Plaintiff
10 also testified that she now drives alone and goes to appointments alone. (AR at 15.)
11 Plaintiff’s husband also testified that their activities included going to the library, taking bus
12 rides, window shopping, playing cards. (AR at 15.) He also reported that plaintiff utilizes the
13 laundry facilities once a week and does not require any assistance. *Id.*

14 As the Commissioner argues, plaintiff’s abilities to maintain a full daily schedule,
15 perform tasks that her husband could not remember, adapt to life changes moving from a shelter
16 to an apartment, spending time with friends, and traveling by herself, belie her claims of
17 disabling memory deficits, concentration, and socializing. (Dkt. No. 15 at 13.) The ALJ
18 properly noted the contradictions between plaintiff’s daily activities and her asserted
19 limitations in discounting Dr. Czysz’s opinions. *See Morgan v. Comm’r of Soc. Sec. Admin.*,
20 169 F.3d 595, 601-02 (9th Cir. 1999) (holding an ALJ may discount a doctor’s opinions of
21 mental limitations that conflict with the claimant’s daily activities).

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01 It is the role of the ALJ to determine credibility, resolve conflict in medical opinions,
02 and resolve ambiguities. *Andrews*, 53 F.3d at 1039. The role of this Court is limited. As
03 noted above, when the evidence is susceptible to more than one rational interpretation, it is the
04 Commissioner's conclusion that must be upheld. *Thomas*, 278 F.3d at 954. Although the
05 interpretation of the record urged by plaintiff may be theoretically possible, it simply cannot be
06 said that plaintiff's view of the evidence is the only rational interpretation. Accordingly, the
07 Court concludes the ALJ did not err in evaluating Dr. Czysz's opinion.

08 2. Plaintiff's Testimony and Credibility

09 Plaintiff also attacks the ALJ's analysis of her credibility. (Dkt. No. 14 at 11-14.) She
10 argues that the ALJ erred in finding that the objective medical evidence and her activities of
11 daily living did not support the alleged severity of her psychological limitations. *Id.* The
12 Commissioner responds that the ALJ considered the entire record properly and offered clear
13 and convincing reasons to justify her adverse credibility finding. (Dkt. No. 15 at 6-11.)

14 According to the Commissioner's regulations, a determination of whether to accept a
15 claimant's subjective symptom testimony requires a two step analysis. 20 C.F.R. §§ 404.1529,
16 416.929; *Smolen*, 80 F.3d at 1281; SSR 96-7p (1996). First, the ALJ must determine whether
17 there is a medically determinable impairment that reasonably could be expected to cause the
18 claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-2; SSR
19 96-7p. Once a claimant produces medical evidence of an underlying impairment, the ALJ may
20 not discredit the claimant's testimony as to the severity of symptoms solely because they are
21 unsupported by objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir.
22 1991) (en banc); *Reddick*, 157 F.3d at 722 (internal citations omitted). Absent affirmative

01 evidence showing that the claimant is malingering, the ALJ must provide “clear and
02 convincing” reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick*,
03 157 F.3d at 722.

04 When evaluating a claimant’s credibility, the ALJ must specifically identify what
05 testimony is not credible and what evidence undermines the claimant’s complaints; general
06 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may
07 consider “ordinary techniques of credibility evaluation” including a reputation for truthfulness,
08 inconsistencies in testimony or between testimony and conduct, daily activities, work record,
09 and testimony from physicians and third parties concerning the nature, severity, and effect of
10 the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec.*
11 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (internal citations omitted).

12 In this case, the ALJ did not improperly reject plaintiff’s subjective symptom testimony.
13 In her analysis, the ALJ identified the applicable legal standards and methodically applied them
14 to specific portions of the record. The ALJ found that the objective medical evidence does not
15 support the alleged severity of plaintiff’s psychological limitations. (AR at 15.) As discussed
16 at length above, the ALJ found the medical records of the Harborview psychiatrists noted
17 numerous inconsistencies in plaintiff’s symptoms and allegations during her hospitalizations.
18 *Id.* The ALJ further found that the psychological evaluations of Drs. Sanchez, Mashburn,
19 Borton, and Eisenhower, demonstrate that the plaintiff’s psychological impairments are not as
20 severe as she has alleged. *Id.*

21 “While subjective pain testimony cannot be rejected on the sole ground that it is not
22 fully corroborated by objective medical evidence, the medical evidence is still a relevant factor

01 in determining the severity of the claimant's" impairments and their disabling effects. *Cf.*
02 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (holding that the objective medical
03 evidence is a relevant factor in determining the severity of claimant's pain). Moreover, the
04 ALJ did not discredit the plaintiff solely by pointing to objective medical evidence. In
05 addition, the ALJ concluded that plaintiff's testimony, when coupled with certain of her daily
06 activities, did not square with the level of debilitating mental impairments plaintiff alleged.

07 The ALJ also provided an appropriate basis for concluding that plaintiff's activities
08 were inconsistent with her alleged impairments. As indicated above, plaintiff's abilities to
09 maintain a full daily schedule, perform tasks that her husband could not remember, adapt to life
10 changes moving from a shelter to an apartment, spending time with friends, and traveling by
11 herself, were inconsistent with her claims of disabling memory deficits, concentration, and
12 socializing. (AR at 14-15.) While plaintiff's activities can be subject to more than one
13 rational interpretation, the ALJ's interpretation of the evidence must be upheld. *See Burch v.*
14 *Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005) (holding that the evidence of daily activities
15 supported the ALJ's credibility determination and must be upheld).

16 The foregoing reasons offered by the ALJ to justify her adverse credibility
17 determination are sufficiently clear and convincing and supported by substantial evidence in the
18 record. Although the evidence presented by the plaintiff may also admit an interpretation
19 more favorable to her, the ALJ's interpretation was rational and therefore binding upon this
20 Court.¹ *See Magallanes*, 881 F.2d at 750.

21
22 ¹Plaintiff also argues that the ALJ failed to provide specific reasons for rejecting her
testimony regarding her seizures. (Dkt. No. 14 at 12-14.) Plaintiff contends that she testified
at the hearing that her seizures occurred approximately once a month, and – although the ALJ

01 3. Lay Witness Testimony

02 Plaintiff also asserts that the ALJ erred by failing to provide germane reasons for
03 rejecting the third party function report of her husband, John Arnold, and the statement
04 prepared by her case manager from the Downtown Emergency Center, Sarah Chamberlin.
05 (Dkt. No. 14 at 15-17.) Defendant responds that the ALJ properly discredited the lay witness
06 statements of plaintiff's husband to the extent it contradicted her daily activities, and the lay
07 statements of Ms. Chamberlin because it was contradicted by the objective medical evidence
08 and the plaintiff's reported wide range of activities. (Dkt. No. 15 at 16-17.)

09 In order to determine whether a claimant has an impairment, an ALJ may also consider
10 lay witness sources, such as testimony from family members. 20 C.F.R. § 404.1513(d)(4).
11 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to
12

13 included a limitation on exposure to hazards including heights and dangerous machinery in her
14 RFC assessment – she did not provide for unscheduled work loss. *Id.* at 14. The
15 Commissioner responds that while the ALJ did not specifically address plaintiff's seizures
16 when evaluating plaintiff's credibility, any error was harmless because the medical record
17 shows that plaintiff's seizures were well controlled on medication. (Dkt. No. 15 at 9-10; AR at
18 12, 326, 460, 563, 715, 717, 720, 724, 727.) The Commissioner further contends that the ALJ
19 discussed at length the evidence regarding plaintiff's seizures and specifically included
20 plaintiff's seizure related limitations in the RFC by prohibiting plaintiff from working around
21 hazards such as heights and dangerous machinery. (Dkt. No. 15 at 9-10.) Plaintiff concedes
22 in her reply brief that her seizure impairment has been effectively controlled by medication
since June 2007, but argues that she is entitled to a closed period of disability between her
alleged onset date in 2002 and June 2007. (Dkt. No. 16 at 8.) The Court disagrees. The
ALJ's opinion specifically accounted for plaintiff's seizure related limitations in her RFC.
Furthermore, as the Commissioner argues, there is no basis to conclude that plaintiff would
miss work because of her seizures. Plaintiff's argument that she is entitled to a closed period
of disability was raised for the first time in her reply brief and is therefore waived. *United*
States ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1199 n.1 (9th Cir. 2009)(new
theory, first raised in a reply brief, is waived) (citing *United States v. Alcan Elec. & Eng'g, Inc.*,
197 F.3d 1014, 1020 (9th Cir. 1999)) (arguments raised on appeal for the first time in a reply
brief are waived)).

01 work is competent evidence, 20 C.F.R. § 404.1513(e), *Sprague v. Bowen*, 812 F.2d 1226, 1232
02 (9th Cir.1987), and therefore cannot be disregarded without comment. *Dodrill v. Shalala*, 12
03 F.3d 915, 918-19 (9th Cir. 1993). If an ALJ wishes to discount the testimony of a lay witness,
04 he must provide reasons germane to each witness and may not simply categorically discredit the
05 testimony. *Id.* Identifying inconsistencies between such statements and the record when
06 looked at as a whole is sufficient. *Lewis v. Apfel*, 236 F.3d 503, 510-12 (9th Cir. 2001).

07 In this case, the ALJ discounted the third party function report of plaintiff's husband,
08 John Arnold. (AR at 15.) As summarized in plaintiff's brief, Mr. Arnold stated that plaintiff
09 had "memory problems," difficulty getting along with others, and "a fear of being by herself."
10 (AR at 157-63.) The ALJ discounted this testimony because it conflicted with plaintiff's wide
11 range of activities. (AR at 15.) As discussed above, plaintiff's abilities to maintain a full
12 daily schedule, perform tasks that her husband could not remember, adapt to life changes
13 moving from a shelter to an apartment, spending time with friends, and traveling by herself,
14 were inconsistent with his claims of disabling memory deficits, concentration, and socializing.
15 (AR at 14-15.) While plaintiff's activities can be subject to more than one rational
16 interpretation, the ALJ's interpretation of the evidence must be upheld. *See Burch*, 400 F.3d at
17 680-81 (holding that the evidence of daily activities supported the ALJ's credibility
18 determination and must be upheld). The foregoing reasons are germane to the credibility
19 determinations and the weight to be accorded to the testimony. The ALJ did not err in
20 discounting the lay statements of plaintiff's husband.

21 Likewise, the ALJ properly discounted the testimony of plaintiff's case manager, Sarah
22 Chamberlin. (AR at 17.) Ms. Chamberlin stated that plaintiff is "not able to retain new

01 information without repetition or the use of her organizer.” (AR at 174, 630.) She further
02 stated that plaintiff is “wholly dependent on her husband to remember details,” and is “unable
03 to go anywhere unaccompanied as she may get lost.” *Id.* She opined that plaintiff would be
04 unable to find or keep gainful employment. *Id.* The ALJ gave this opinion “little weight”
05 finding it inconsistent with the objective medical evidence and the plaintiff’s reported wide
06 range of activities. (AR at 17.) As the Commissioner argues, and as discussed at length
07 above, the Harborview psychiatrists found no memory limitations (AR at 222-23, 237-38), Dr.
08 Sanchez reported that plaintiff’s organizer was mostly blank (AR at 275-76), and Drs. Sanchez,
09 Mashburn, Borton, and Eisenhaur generally agreed that she had a functional memory. (AR at
10 278, 330, 401-02, 562.) In addition, the ALJ found that plaintiff was able to maintain a full
11 daily schedule, perform tasks that her husband could not remember, adapt to life changes
12 moving from a shelter to an apartment, spending time with friends, and travel by herself. (AR
13 at 14-15, 17.) As the Commissioner argues, plaintiff’s disagreement with these findings is
14 insufficient to show error. The ALJ did not err in discounting the lay statements of plaintiff’s
15 case manager.

16 B. Step Three

17 Plaintiff also asserts that the ALJ’s rejection of the medical opinion evidence and
18 testimonial evidence was significant because it led to the ALJ’s finding at step three that
19 plaintiff did not meet equal listings 12.02, 12.04, 12.08, and 12.09. (AR at 13.) Plaintiff
20 reiterates her argument that the ALJ erred in this regard. (Dkt. No. 14 at 17-18.) As fully
21 discussed above, however, the ALJ properly weighed the opinion evidence and the subjective
22 statements of record. In addition, the ALJ properly determined plaintiff’s RFC. Although

01 plaintiff argues that the ALJ's limitation to unskilled work fails does not reflect all of her
02 limitations, she has not demonstrated that the record requires any additional functional
03 limitations. Because this Court has already rejected plaintiff's arguments, the Court finds the
04 ALJ did not err at step three.

05 C. Step Four

06 At step four, the claimant bears the burden of proving that she can no longer perform her
07 past relevant work. 20 C.F.R. §§ 404.1512(a), 404.1520(f); *Barnhart v. Thomas*, 540 U.S. 20,
08 25 (2003). Although the burden of proof lies with the claimant, the ALJ retains a duty to make
09 factual findings to support his conclusion, including a determination of whether the claimant
10 can perform the actual functional demands and job duties of her past relevant work or the
11 functional demands and job duties of the occupation as generally performed in the national
12 economy. *Pinto v. Massanari*, 249 F.3d 840, 844-45 (9th Cir. 2001) (citing Social Security
13 Ruling ("SSR") 82-61). "This requires specific findings as to the claimant's residual
14 functional capacity, the physical and mental demands of the past relevant work, and the relation
15 of the residual functional capacity to the past work." *Id.* at 845 (citing SSR 82-62).

16 In the present case, the ALJ satisfied the first requirement, as discussed above, in that
17 she made sufficiently specific findings of fact regarding plaintiff's RFC. In support of her
18 conclusion that plaintiff could perform her past relevant work as a grocery bagger and hand
19 packager, the ALJ relied upon the testimony of the vocational expert ("VE") that a person with
20 plaintiff's current RFC could perform these positions. (AR at 18.) However, as plaintiff
21 argues, the ALJ failed to make adequate findings as to the physical and mental demands of
22 plaintiff's past work as the ALJ was required to do. (Dkt. 14 at 19.)

01 Despite the ALJ's error in identifying the physical and mental demands of plaintiff's
02 past work, any error was harmless because the ALJ identified other jobs existing in the national
03 economy that plaintiff is able to perform. (AR at 18); *Curry v. Sullivan*, 925 F.2d 1127, 1131
04 (9th Cir. 1991) (finding that harmless error applies to social security rulings).

05 D. Step Five

06 The final issue raised by plaintiff is that the ALJ erred at Step 5 because she did not
07 asked the vocational expert ("VE") a hypothetical that included the limitations expressed by Dr.
08 Czysz and those that were testified to by plaintiff. (Dkt. No. 14 at 21.) Accordingly, plaintiff
09 argues the hypothetical asked of the VE was an incomplete and improper hypothetical.

10 After a plaintiff has demonstrated that she has a severe impairment that prevents her
11 from doing her past relevant work, she has made a prima facie showing of disability. *Tackett*,
12 180 F.3d at 1100. The burden then shifts to the Commissioner at step five to demonstrate that,
13 in light of the claimant's RFC, age, education, and work experience, she can perform other
14 types of work that exist in "significant numbers" in the national economy. *Id.*; 20 C.F.R.
15 §§ 404.1520(f), 416.920(f). An ALJ can determine this issue by calling upon a VE for
16 assistance. *Tackett*, 180 F.3d at 1094. In such a scenario, the ALJ must provide the VE with
17 an accurate and detailed description of the claimant's impairments, as reflected by the medical
18 evidence of record. *Id.* at 1101. An ALJ may, however, exclude restrictions in a hypothetical
19 question that are not supported by substantial evidence. *Osenbrock v. Apfel*, 240 F.3d 1157,
20 1164-65 (9th Cir. 2001).

21 As discussed above, the ALJ appropriately rejected the opinion of Dr. Czysz and found
22 the plaintiff to be less than fully credible. As a result, the failure to include the limitations

01 suggested by Dr. Czysz's opinion and the plaintiff did not render the hypothetical tendered to
02 the VE either incomplete or improper. The ALJ did not err.

03 V. CONCLUSION

04 For the foregoing reasons, the Court recommends that this case be AFFIRMED. A
05 proposed order accompanies this Report and Recommendation.

06 DATED this 6th day of May, 2011.

07
08 
09 Mary Alice Theiler
United States Magistrate Judge